

Message Text

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APPROVED BY SBVANCE

ARA - MR. SHLAUDEMAM

JUSTICE - MR. SITVER (PHONE)

DEA - MR. DMILLER (INFO)

JUSTICE - MR. MSTEIN (PHONE)

L/M/SCA - MR. KEMALMBORG (DRAFT)

ARA/BR:R J. BALLANTYNE

ARA/APU:PFAUCETT

ARA:A.P. SHANKLE

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TO AMEMBASSY BRASILIA

AMEMBASSY MONTEVIDEO

C O N F I D E N T I A L STATE 128407

E.O. 11652: GDS

TAGS: SNAR

SUBJECT: US V. TOSCANINO: REPORT ON NARCOTICS CASE WITH
BRAZILIAN CONNECTION

1. ON MAY 15, 1974, THE US SECOND CIRCUIT COURT OF APPEALS
DECIDED THE TOSCANINO CASE AND REMANDED THE CASE TO THE
DISTRICT COURT FOR AN EVIDENTIARY HEARING ON TOSCANINO'S
ALLEGATIONS OF FORCIBLE ABDUCTION BY BRAZILIAN AMERICAN-
AGENTS AND THE QUESTION OF WIRETAPPING.

2. JUSTICE DEPT. IS CONSIDERING A PETITION FOR REHEARING
IN THE SECOND CIRCUIT EN BANC (BEFORE ALL OF THE JUDGES OF
THAT CIRCUIT) TO PERMIT RECONSIDERATION OF ERRORS OF LAW
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IN THE MAY 15TH DECISION. SHOULD THE SECOND CIRCUIT DENY

THE REHEARING, IT IS ASSUMED THAT JUSTICE COULD APPEAL TO THE SUPREME COURT.

3. IN THE EVENT THAT THE CASE IS ULTIMATELY REMANDED FOR THE EVIDENTIARY HEARING, THE CONDUCT OF BRAZILIAN, URUGUAYAN AND AMERICAN OFFICIALS WILL BE THE PRIMARY OBJECT OF THE INQUIRY. TOSCANINO SPECIFICALLY ALLEGES THAT HE WAS KIDNAPPED FROM HIS HOME IN MONTEVIDEO, URUGUAY BY HUGO CAMPAS HERMEDIA (A MONTEVIDEO POLICEMAN AND, ACCORDING TO TOSCANINO'S ALLEGATION, "THE PAID AGENT OF THE UNITED STATES GOVERNMENT") AND TAKEN TO THE URUGUAYAN-BRAZILIAN BORDER.

THE COURT'S OPINION CONTAINS THIS ACCOUNT OF TOSCANINO'S TREATMENT IN BRAZIL:

QUOTE "ONCE IN THE CUSTODY OF BRAZILIANS, TOSCANINO WAS BROUGHT TO PORTO ALEGRE WHERE HE WAS HELD INCOMMUNICADO FOR ELEVEN HOURS. HIS REQUESTS TO CONSULT WITH COUNSEL, THE ITALIAN CONSULATE, AND HIS FAMILY WERE ALL DENIED. DURING THIS TIME HE WAS DENIED ALL FOOD AND WATER.

"LATER THAT SAME DAY TOSCANINO WAS BROUGHT TO BRASILIA... FOR SEVENTEEN DAYS TOSCANINO WAS INCESSANTLY TORTURED AND INTERROGATED. THROUGHOUT THIS ENTIRE PERIOD THE UNITED STATES GOVERNMENT AND THE UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK PROSECUTING THIS CASE WAS AWARE OF THE INTERROGATION AND DID IN FACT RECEIVE REPORTS AS TO ITS PROGRESS. FURTHERMORE, DURING THIS PERIOD OF TORTURE AND INTERROGATION A MEMBER OF THE UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF NARCOTICS AND DANGEROUS DRUGS WAS PRESENT AT ONE OR MORE INTERVALS AND ACTUALLY PARTICIPATED IN PORTIONS OF THE INTERROGATION... (TOSCANINO'S) CAPTORS DENIED HIM SLEEP AND ALL FORMS OF NOURISHMENT FOR DAYS AT A TIME. NOURISHMENT WAS PROVIDED INTRAVENOUSLY IN A MANNER PRECISELY EQUAL TO AN AMOUNT NECESSARY TO KEEP HIM ALIVE. REMINISCENT OF THE HORROR STORIES TOLD BY OUR MILITARY MEN WHO RETURNED FROM KOREA AND CHINA, TOSCANINO WAS FORCED TO WALK UP AND DOWN A HALLWAY FOR SEVEN OR EIGHT HOURS AT A TIME. WHEN HE
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COULD NO LONGER STAND HE WAS KICKED AND BEATEN BUT ALL IN A MANNER CONTRIVED TO PUNISH WITHOUT SCARRING. WHEN HE WOULD NOT ANSWER, HIS FINGERS WERE PINCHED WITH METAL PLIERS. ALCOHOL WAS FLUSHED INTO HIS EYES AND NOSE AND OTHER FLUIDS...WERE FORCED UP HIS ANAL PASSAGE. INCREDIBLY, THESE AGENTS OF THE UNITED STATES GOVERNMENT ATTACHED ELECTRODES TO TOSCANINO'S EARLOBES, TOES, AND GENITALS. JARRING JOLTS OF ELECTRICITY WERE SHOT

THROUGHOUT HIS BODY, RENDERING HIM UNCONSCIOUS FOR INDETERMINATE PERIODS OF TIME BUT AGAIN LEAVING NO PHYSICAL SCARS.

"FINALLY ON OR ABOUT JANUARY 25, 1973 TOSCANINO WAS BROUGHT TO RIO DE JANEIRO WHERE HE WAS DRUGGED BY BRAZILIAN-AMERICAN AGENTS AND PLACED ON PAN AMERICAN AIRWAYS FLIGHT 202 DESTINED FOR THE WAITING ARMS OF THE UNITED STATES GOVERNMENT. ON OR ABOUT JANUARY 26, 1973 HE WOKE IN THE UNITED STATES, WAS ARRESTED ON THE AIRCRAFT, AND WAS BROUGHT IMMEDIATELY TO THOMAS PUCCIO, ASSISTANT UNITED STATES ATTORNEY." UNQUOTE

4. AN EVIDENTIARY HEARING (ON REMAND) WOULD INEVITABLY RESULT IN A REQUEST FOR BRAZILIAN AND URUGUAYAN WITNESSES AND WOULD INITIATE EFFORTS TO COMPEL ACCESS TO OR PRODUCTION OF DOCUMENTARY FILES OF INVOLVED US FEDERAL AGENCIES. (FYI, DEPARTMENT UNDERSTANDS THAT URUGUAY HAS AGREED TO PRODUCE WITNESSES ON REQUEST. END FYI) SUCH A HEARING WOULD UNDOUBTEDLY PRODUCE WIDESPREAD MEDIA COVERAGE OF THE ALLEGED BRUTALITY, WITH THE ATTENDANT MEDIA COMMENTARY AND PROBABLY CONGRESSIONAL INTEREST.

5. THE FAR REACHING LEGAL IMPACT OF THIS DECISION IS TO OVERRULE, AT LEAST IN THE KEY SECOND CIRCUIT (NEW YORK AREA), THE LONGSTANDING RULE ESTABLISHED BY THE SUPREME COURT IN *KER V. ILLINOIS* (1886) AND *FRISBIE V. COLLINS* (1952) WHICH HELD IN EFFECT THAT THE GOVERNMENT'S POWER TO PROSECUTE A DEFENDANT IS NOT IMPAIRED BY THE METHOD BY WHICH IT ACQUIRES CONTROL OVER HIM. THE *KER* CASE INVOLVED AN AMERICAN CITIZEN WHO WAS FORCIBLY ABDUCTED BY A PINKERTON AGENT (ACTING UNDER THE AUTHORITY OF THE PRESIDENT) FROM PERU AND BROUGHT TO ILLINOIS WHERE HE WAS CONFIDENTIAL

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TRIED AND CONVICTED. THE SUPREME COURT UPHELD ILLINOIS' RIGHT TO TRY *KER* REGARDLESS OF THE METHOD WHICH IT ACQUIRED CONTROL OVER HIM. THIS DOCTRINE WAS REAFFIRMED IN THE *FRISBIE* CASE WHICH INVOLVED, IN EFFECT, AN INTER-STATE "KIDNAPPING" TO ACQUIRE CRIMINAL JURISDICTION. THE SUPREME COURT THUS RECOGNIZED, IN 1952, THAT IT "HAS NEVER DEPARTED FROM THE (*KER*) RULE --- THAT THE POWER OF A COURT TO TRY A PERSON FOR CRIME IS NOT IMPAIRED BY THE FACT THAT HE HAD BEEN BROUGHT WITHIN THE COURT'S JURISDICTION BY REASON OF A 'FORCIBLE ABDUCTION' --- (SINCE) DUE PROCESS OF LAW IS SATISFIED WHEN ONE PRESENT IN COURT IS CONVICTED OF CRIME AFTER BEING FAIRLY APPRIEZED OF THE CHARGES AGAINST HIM AND AFTER A FAIR TRIAL IN ACCORDANCE WITH CONSTITUTIONAL PROCEDURAL SAFEGUARDS." THE SECOND CIRCUIT CITES SEVERAL LATER SUPREME COURT DECISIONS (MODIFYING THE

FRISBIE DOCTRINE TO RESTRICT POLICE ILLEGAL CONDUCT IN DOMESTIC CASES, BUT NOT OVERRULING THE KER RULE ON THE QUESTION OF ENFORCEMENT TACTICS ABROAD.) AND SEVERAL SECOND CIRCUIT DECISIONS (DISTINGUISHING FRISBIE ON FACTUAL GROUNDS) TO REACH ITS CONCLUSION THAT "THE 'KER-FRISBIE' RULE CANNOT BE RECONCILED WITH THE SUPREME COURT'S EXPANSION OF THE CONCEPT OF DUE PROCESS (REFERRING TO, AMONG OTHERS, THE FAMOUS MIRANDA RULE, WHICH HAS ONLY THIS WEEK BEEN MODIFIED BY THE SUPREME COURT TO NARROW THE BROAD SWEEP OF THAT DECISION)." THE SECOND CIRCUIT VIEW IS THAT DUE PROCESS "NOW REQUIRE(S) A COURT TO DIVEST ITSELF OF JURISDICTION OVER THE PERSON OF A DEFENDENT WHERE IT HAS BEEN ACQUIRED AS THE RESULT OF THE GOVERNMENT'S DELIBERATE UNNECESSARY AND UNREASONABLE INVASION OF THE ACCUSED'S CONSTITUTIONAL RIGHTS."

6. ANOTHER TROUBLESOME ASPECT OF THE DECISION IS THE EXTRATERRITORIAL EXTENSION OF BILL OF RIGHTS TO NON-U.S. CITIZENS. IT IS, OF COURSE, SETTLED LAW THAT AMERICAN CITIZENS MAY INVOKE THE FOURTH AMENDMENT AGAINST UNREASONABLE SEARCHES AND SEIZURES CONDUCTED BY AGENTS OF USG BEYOND THE CONTINENTAL LIMITS OF THE U.S.; HOWEVER, THE EXTRATERRITORIAL APPLICATION OF THIS GUARANTEE TO ALIENS IS NOT AT ALL SETTLED. THE SECOND CIRCUIT, IN THIS CASE, HELD THAT "ALIENS WHO ARE THE VICTIMS OF UNCONSTITUTIONAL ACTION ABROAD" SHOULD RE-
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CEIVE THE SAME PROTECTION AS AN AMERICAN CITIZEN. THIS EXTRATERRITORIAL DUE PROCESS DOCTRINE HAS GRAVE RAMIFICATIONS IN THE BROAD APPLICATION OF THIS PRECEDENT. WHILE USG ENFORCEMENT AGENTS IN FOREIGN COUNTRIES SHOULD NOT ENGAGE IN BRUTAL TACTICS IN FURTHERANCE OF NARCOTICS CONTROL ACTIVITIES, IT IS DIFFICULT TO HOLD THEM FULLY ACCOUNTABLE TO THE LETTER OF OUR PRECEPTS OF DUE PROCESS WHEN THEY ARE INVOLVED IN JOINT EFFORTS WITH OFFICIAL OF FOREIGN GOVERNMENTS WHO OPERATE UNDER DIFFERING CONCEPTS OF PROCEDURAL DUE PROCESS.

7. AS THE DEPARTMENT OF JUSTICE CONSIDERS THE APPROPRIATE NEXT STEP WITH RESPECT TO THIS DECISION THE USG IS UNDERTAKING INTERAGENCY CONSULTATION TO DEVELOP STANDARDS OF CONDUCT FOR U.S. ENFORCEMENT PERSONNEL ABROAD IN EXPULSION AND EXTRADITION CASES. THE RESULT OF THIS EFFORT WILL BE DISSEMINATED AT THE EARLIEST POSSIBLE TIME. SISCO

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